

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 832 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?  
1 to 5 No

-----  
CHANDIBEN SAGUBHA

Versus

GANDHI MULCHAND KHODIDAS

-----  
Appearance:

MR SURESH M SHAH for Petitioner

MR BS SUPEHIA for Respondent No. 1

-----  
CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 21/01/98

ORAL JUDGEMENT

This is a petitioner-tenant's appeal under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Act' against judgement and decree dated 3.5.1986 passed by the Assistant Judge, Junagadh whereby the learned judge confirmed the judgement and decree dated 30.9.1983 passed by the Third Joint Civil Judge (J.D.), Junagadh.

The plaintiff filed a suit for eviction of the suit premises on the ground of arrears of rent for more than six months, nuisance and annoyance, acquisition of alternative accommodation etc. in the court of Civil Judge, Junagadh in the year 1979. According to the plaintiff, the tenant was required to pay rent at the rate of Rs. 22/- per month payable according to English Calendar month. He did not pay the rent for the period 1.4.1976 to 30.6.1979 i.e. for 39 months amounting to Rs. 858/-. The suit was resisted by the defendants on various grounds. It was denied that she was a tenant in arrears of rent for 39 months. According to her, she had deposited the amount of rent in earlier proceedings between the parties and the said amount was withdrawn by the plaintiff. On appreciation and analysis of the evidence produced before him, the learned trial judge came to the conclusion that the tenant was in arrears of rent for more than 6 months and that she had neglected to or failed to pay the rent. The court further held that the tenant failed to prove that she was ready and willing to pay the rent and hence the case was covered by Section 12(3)(a) of the Act. The learned judge also found that the defendant was successor tenant under Section 5(11)(c)(i) of the Act and therefore the suit was not bad for non-joinder of necessary parties. In view of this finding, the trial court decreed the suit. The defendant-tenant preferred appeal against the said judgement which was dismissed by the judgement and decree dated 3.5.1986.

It is contended by Mr. S.M. Shah, learned counsel for the petitioner that the tenant was under obligation to pay the Education Cess in addition to the rent of Rs. 22/-. He further submitted that the court below Exh. 33 has fixed the standard rent at Rs. 22/plus tax. In view of this fact and the settled legal position of law that Education Cess formed part of the rent and that component being not payable by month, in such cases the Education Cess has to be paid by the tenant, the case would not be covered by Section 12(3)(a) but under Section 13(3)(b) of the Act. The learned counsel has referred to the decision of the court in the case of PRAKASH SURYA VS. RASIKLAL MEHTA reported in 18 G.L.R. 1024. The learned counsel has also placed reliance on unreported decision of this court in SURESHCHANDRA BABULAL & ORS VS. SUMITRABEN CHIMANLAL & ORS (Civil Revision Application No. 272 of 1973 decided on 2.11.1976). Mr. Supehia, learned counsel for the respondents submits that there was no demand by the plaintiff for Education Cess and such cited cases have no

application to the facts of the present case. I am unable to agree with Mr. Supehia. In the above referred two cases this court has held in terms that even if there was no demand by the plaintiff of the tax, that fact is hardly relevant. Once it is held that there is a liability to pay the tax, the case would go out of Section 12(3)(a). Learned counsel Mr. Supehia has referred to the decision in the case of RAJU KAKARA SHETTY VS. RAMESH PRATAPRAO SHIROLE AND ANOTHER reported in 1991(1) Rent Control Journal 230. It is held therein that a right to recover a certain tax amount from the tenant-occupant under the provision of a statute can be waived by the owner or quantified by agreement at a figure not exceeding the total liability under the statute. In my view the said case is of no assistance to the respondent landlord as it is not the case of the plaintiff that at the time of lending of the premises the landlord has waived his right to reimburse the tax from the tenant. Be that as it may, there is an order of the court fixing the standard rent at Rs. 22/- plus tax.

In view of the aforesaid, in my view, the present case is out of the purview of Section 12(3)(a). Now the question arises whether the case falls under Section 12(3)(b) or not. Mr. Shah learned counsel for the petitioner has referred to a decision of the apex court N.M. ENGINEER VS. NARENDRA SINGH VIRDHI reported in AIR 1995 SC 448 wherein it is held that when the suit under Section 12(3)(a) fails, there cannot be resort to Section 12(3)(b) of the Act. It is however agreed by Mr. S.M. Shah, learned counsel for the petitioner that the matter may be remitted to the trial court with a direction to frame a proper issue as to whether the defendant is entitled to protection under Section 13(3)(b) of the Act.

In view of the aforesaid the Civil Revision Application is allowed and the judgement and decree dated 3.5.1986 passed by the Assistant Judge, Junagadh and the judgement and decree dated 30.9.1983 passed by the Third Joint Civil Judge (J.D.) at Junagadh are quashed and set aside. It is directed that the trial court shall now frame an additional issue as to whether the defendant tenant is entitled to protection under Section 12(3)(b) of the Act or not. The parties will be allowed to lead evidence on the said limited issue and decide the case within a period of three months from the date of appearance of the parties before the said court. The parties shall appear before the Third Joint Civil Judge(J.D.) on 16.2.1998. Rule is made absolute to the aforesaid extent. Writ and record of the case be sent forthwith to the trial court.

00000

pkn.